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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 16, 1997

Office of the Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Application by Ameritech Michigan Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Michigan; CC Docket No. 97-137

Dear Sir/Madam:

Enclosed for filing please find an original and six copies of the Joint Motion of MCI, WorldCom, and ALTS to Strike Ameritech's Reply to the Extent it Raises New Matters, or, in the Alternative, to Re-Start the Ninety-Day Review Process.

Thank you for your assistance.

Sincerely,

D. Scott Barash

Enclosures (7)

No. of Copies rec'd 026

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Ameritech Michigan	)	**CC Docket No. 97-137**
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	
Provide In-Region, InterLATA	)	
Services in Michigan	)	

JOINT MOTION OF MCI, WORLDCOM AND ALTS TO STRIKE AMERITECH'S REPLY TO THE EXTENT IT RAISES NEW MATTERS, OR, IN THE ALTERNATIVE, TO RE-START THE NINETY-DAY REVIEW PROCESS

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July 16, 1997

INTRODUCTION

In a futile effort to save its application for interLATA entry in Michigan, Ameritech has dumped an enormous reply submission on the Commission laced with new facts, legal arguments and expert opinions. Much of this material either could have been included in Ameritech's initial submission (and is therefore improper) or relates to events occurring after the date its application was filed and is not directly responsive to matters raised in other parties' comments (and is therefore irrelevant). Among other things, Ameritech asks this Commission to grant its application based on the conclusion of its experts that "local competition has dramatically increased even in the short period of time since Ameritech's Application was filed in mid-May."[1] New evidence concerning post-application developments involving unbundled local switching and operations support systems -- two checklist items which Ameritech plainly had not satisfied on the date it filed its application -- also feature prominently. Dozens of other less dramatic but no less prejudicial instances of Ameritech's reliance on new evidence and expert testimony can be found in its massive reply.

In addition to being fundamentally unfair to interested parties, Ameritech's filing of twenty-eight new affidavits -- containing approximately 1700 pages of additional information -- flies in the face of the procedures established by this Commission for evaluating applications pursuant to § 271 of the Telecommunications Act of 1996 ("the Act"). To preserve its ability to engage in reasoned decision-making, the Commission should enforce its well-publicized

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[1] See Reply Brief in Support of Application by Ameritech Michigan for Provision of In-Region, InterLATA Services in Michigan at 26 n. 33, CC Docket No. 97-137 (filed July 7, 1997)("Ameritech Reply"), citing Harris/Teece Reply Aff.

procedures and strike Ameritech's reply comments and affidavits from the record in this proceeding to the extent that they raise new factual and legal matters. In determining which portions of Ameritech's reply submission to strike, the Commission should apply the following rule:

> An application pursuant to §271 of the Act must be complete on the date it is filed. Any reply submission in support of such an application shall respond only to factual and legal arguments raised in responsive comments of other parties. An applicant may introduce evidence concerning post-application matters only if such evidence is directly and necessarily responsive to matters raised by other commenting parties.

Movants MCI Telecommunications Corporation ("MCI"), WorldCom, Inc., and the Association for Local Telecommunications Services ("ALTS") have submitted a proposed order with this motion setting forth in detail those portions of Ameritech's reply comments and affidavits that should be stricken.

Alternatively, the Commission should start the ninety-day clock for considering Ameritech's application anew, and allow interested parties -- including the Department of Justice and the Michigan Public Service Commission -- a full opportunity to comment on this additional information.

ARGUMENT

Congress placed the burden squarely on the BOC applicant to prove each element that needs to be established before an application to provide in-region, interLATA service under § 271 of the Act can be granted. Congress also imposed a strict and short ninety-day deadline on the Commission to act on a BOC application to provide in-region long-distance service. Finally, Congress required the Commission to make rules allowing both the Department of Justice and the relevant state commission the opportunity to offer their opinions about the evidence submitted by the BOC. 47 U.S.C. § 271(d).[2]

In order to fulfill these statutory commands, the Commission promulgated explicit rules governing the timing and content of BOC applications to provide in-region long-distance service.[3] Through those rules, the Commission sought to prevent exactly what has occurred here by stating that:

> We expect that a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings thereon. In the event that the applicant submits (in replies or ex parte filings) factual evidence that changes its application in a material respect, the Commission reserves the right to deem such submission a new application and start the 90-day review process anew.

§ 271 Procedures Order at 2. The Commission went on to state that "[r]eply comments may not

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[2] See In the Matter of Application by SBC Communications, Inc., Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in the State of Oklahoma, CC Docket No. 97-121 at 10 & n.52 (1997) ("Oklahoma Order").

[3] See Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act, Public Notice, FCC 96-469, 1996 WL 706006 (Dec. 6, 1996)("§ 271 Procedures Order").

raise new arguments that are not directly responsive to arguments other participants have raised." Id. at 4.

Ameritech has already challenged the Commission once in this regard and was quite properly rebuffed. Earlier this year, Ameritech submitted a § 271 application for Michigan before it had a final approved interconnection agreement in that state.[4] Ameritech then attempted to supplement its filing with new information that its agreement with AT&T had been approved. This information was disputed by the Michigan Public Service Commission itself. This Commission ordered Ameritech either to proceed without reference to the disputed interconnection agreement or to withdraw its application. Order Striking Ameritech § 271 App. ¶¶ 25-26. At that time, the Commission reiterated the rule set forth in its § 271 Procedures Order, stating that "[b]ecause of the strict 90-day statutory review period, the section 271 review process is keenly dependent on both final approval of a binding agreement pursuant to section 252 as well as an applicant's submission of a complete application at the commencement of a section 271 proceeding." Id. ¶ 19 (emphasis added). And, lest there be any doubt remaining about the Commission's intention to enforce its rules in this regard, in its recent Oklahoma Order the Commission again reiterated that "[g]iven the expedited time in which the Commission must review these applications, it is the responsibility of the BOC to submit to the Commission a full and complete record upon which to make determinations on its application." Oklahoma Order at

[4] See In the Matter of Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan, Order, CC Docket No. 97-1, 1997 WL 52225 (rel. Feb. 7, 1997)("Order Striking Ameritech § 271 App.").

36.

Such a rule makes perfect sense and works no unfairness at all on the BOC applicant. The date on which a BOC seeks authority to offer in-region interLATA service is wholly within the BOC's control, and so a § 271 application must be complete when filed -- and may not be supplemented with additional evidence or expert testimony -- in order to allow interested parties and governmental entities an opportunity to aim at a stationary target. If events change in a material way, then the BOC is free simply to refile. With such ground rules in place, there is no warrant for a BOC "supplementing" an application with new material. If Ameritech now understands that its filing was premature -- as seems clear by its extensive reliance on post-application events and new arguments -- then Ameritech should withdraw it and refile when it has satisfied the requirements of the Act.

Ameritech knows all this. In fact, in an ex parte meeting with the Commission, Ameritech agreed that "materials included in Ameritech's Reply Comments should be responsive to comments filed on the application."[5] But Ameritech has turned its back on this "agreement" and thumbed its nose at the Commission's rules. Apparently recognizing the deficiencies in its application as filed on May 21, Ameritech has attempted to add to the record in an effort to show that it has made more progress towards satisfying the competitive checklist in the weeks since it filed its application and that local competition is advancing in Michigan.

Ameritech asks this Commission to find that it has complied with the competitive checklist based on events occurring after its application was filed. For example:

---

[5] See Letter from L. Starr to W. Caton (July 1, 1997)(Exhibit 1 hereto).

- Ameritech relies on its purportedly "flawless performance in May" in support of its claim that it satisfied the parity standards for interconnection on the date its application was filed. Ameritech Reply at 12.

- "[T]he initial trial recently completed by AT&T and Ameritech . . . convincingly demonstrated Ameritech's operational readiness to furnish the platform." Ameritech Reply at 23 (citing Kocher Reply Aff.).

- Ameritech claims that "Ameritech and TCG have recently reached agreement regarding all major operational issues." Mickens Reply Aff. ¶ 53 and Sched. 3. TCG, of course, has had no opportunity to say whether this is true.

- Ameritech cites new data from "recently generated reports for directory assistance and operator services" showing average speed of answer of DA and OS calls. Mickens Reply Aff. ¶ 26 and Sched. 35.

- Ameritech asserts that, since its May filing, TCG and AT&T continue rapidly to expand their customer bases in Michigan, thus purportedly proving that Ameritech is fulfilling its statutory obligations. Mickens Reply Aff. ¶¶ 79 & 80.

- "Just within the last two weeks AT&T has submitted thousands of orders which were processed with a high electronic flow-through rate, a low order rejection rate, and without significant performance problems." Rogers Reply Aff. ¶ 9. Ameritech describes AT&T ordering activity during "a recent three day period" -- June 25-27, 1997 -- as further evidence of its checklist compliance. Rogers Reply Aff. ¶ 39.

- With respect to MCI's criticism that Ameritech's error messages only disclose one error per order, Ameritech concedes that criticism "was correct," but only "until recently." Ameritech claims that it implemented a correction on June 30, 1997. Rogers Reply Aff. ¶ 58.

- Ameritech discusses in detail the now-completed first phase of its "platform" trial with AT&T, claiming repeatedly that the trial was "a success" and attaching a self-serving account of the results of the trial. Kocher Reply Aff. ¶¶ 88-95 and Attach. 24. Ameritech also describes the newly-planned next phase of its trial with AT&T. Kocher Reply Aff. ¶¶ 96-101.

- "Ameritech continues to hire additional services representatives to accommodate increased demand." Mayer/Mickens/Rogers Joint Reply Aff. ¶ 61.

- Ameritech submits new data on due date and FOC performance, claiming that "Ameritech's due date performance continues to improve." Mayer/Mickens/Rogers Joint

Reply Aff. ¶63 and Sched. 4.

- Ameritech discusses in detail the activities it has undertaken post-filing in order to resolve problems with EOI blocking and claims that its region-wide blockage figures have "dramatically improved over the past month." Mayer/Mickens/Rogers Joint Reply Aff. ¶¶ 75, 83, 101.

Ameritech even asked its experts to opine on the state of competition in Michigan after the filing of its application, apparently in the hope that the Commission would ignore the plain deficiencies in its application as filed in May: "Indeed, as the reply affidavit of Professors Harris and Teece shows, local competition has dramatically increased even in the short period of time since Ameritech's Application was filed in mid-May." Ameritech Reply at 26 n.33, citing Harris/Teece Reply Aff. Ameritech claims that local competition in Michigan is advancing rapidly -- even "[i]n just the past few days." Harris/Teece Joint Reply Aff. ¶ 3; see, e.g., id. at ¶¶ 4-5, 30, Tables II.1 and II.2, Figures 1 and 2; Edwards Reply Aff. ¶¶ 7-8 (referring to "exploding" competition in Michigan).

In other instances, Ameritech submitted new evidence that could have been included with its initial application:

- Ameritech attempts to bolster its claim that common transport is not a network element with new arguments and factual material that could have been raised much earlier. Ameritech Reply at 19-20.

- Ameritech submits an affidavit of two outside experts that is based entirely on a review that post-dates the filing of Ameritech's application and is replete with new evidence, new statistics, and new arguments. Gates/Thomas Reply Aff. In discussing the basis of their affidavit, Mssrs. Gates and Thomas say: "During May, June and July 1997, we directed an Andersen team of information systems professionals in assessing the investigations performed and actions taken by Ameritech in response to these [OSS operational] issues." Id. at ¶ 16. Needless to say, no commenter has had a chance to examine and challenge these wholly new expert opinions.

- Rather than limiting itself to attempts to rebut commenters' arguments, Ameritech presents new arguments of its own for the proposition that Ameritech's cost models understate the true forward-looking costs. Aron Reply Aff. ¶¶ 98-105.

- Ameritech relies on a survey regarding long-distance customers' use of optional calling plans, although this survey was not included in its application and has not been exposed to commenters' scrutiny. MacAvoy Reply Aff. ¶ 16 and nn.14-16.

Allowing Ameritech to inundate the Commission with this mountain of new evidence at this time "would be unfair to interested third parties seeking to comment on a fixed record triggered by the date that a section 271 application is filed." Order Striking Ameritech § 271 App. ¶ 19. It would also short-circuit the ability of both the Department of Justice and the Michigan Public Service Commission -- both of which were given explicit consultative roles to play under the Act -- to comment on the full record before the Commission. Such a result would contradict the letter of the Act and the intent of Congress. The Commission recognized this when it struck a portion of Ameritech's first § 271 application, stating that "completeness is essential in order to permit interested parties, state commissions, and the Department of Justice a realistic opportunity to comment, and for the FCC to evaluate, an enormous and complex record in a short period of time." Order Striking Ameritech § 271 App. ¶ 19. Finally, allowing Ameritech to supplement its filing in this manner surely would "undermine this Commission's ability to render a decision within the 90-day statutory timeframe." Order Striking Ameritech § 271 App. ¶ 19. If the BOCs ever make serious efforts to comply with the Act, then there will come a time when the Commission will face a difficult task in making the checklist and public interest findings required of it. Its ability to make a reasoned judgment is undermined by a BOC's submission of entirely new facts, arguments, and expert opinions halfway through the short ninety-day timeframe.

Moreover, fundamental fairness dictates that an applicant should not be permitted to raise new matters -- either facts or legal arguments -- in a reply to which opposing parties have no opportunity to respond. This basic principle is reflected in courts' and administrative agencies' uniform practice of prohibiting, or permitting response to, new matters that are raised for the first time in a reply. See, e.g., Provenz v. Miller, 102 F.3d 1478, 1483 (9th Cir. 1996) (new evidence submitted with reply brief in support of summary judgment must be excluded, or opposing party must be given opportunity to respond); Cronin v. FAA, 73 F.3d 1126, 1134 (D.C. Cir. 1996) (circuit court will not entertain arguments raised for first time in reply brief); 47 C.F.R. § 1.726 (replies in complaint cases "shall be responsive to only those allegations contained in affirmative defenses"); 47 C.F.R. § 76.1003 (reply in FCC adjudicatory proceeding "shall not contain new matters"); 49 C.F.R. § 365.121 ("The reply statement may not contain new evidence."). Grounded as it is in fundamental ideas of procedural fairness, the rule against raising new matters in a final reply is universal.

This rule's application in the summary judgment context is particularly instructive. A party that has moved for summary judgment cannot rely on factual evidence that it has only submitted with its reply brief, and to which the non-moving party has had no chance to respond. See, e.g., Provenz, 102 F.3d at 1483; Black v. TIC Investment Corp., 900 F.2d 112, 116 (7th Cir. 1990). For a court to permit otherwise would be grossly unfair to the non-moving party and would invite all manner of strategic behavior on the part of the movant. Similarly, Ameritech should not be permitted to rely on factual evidence that it has only placed in the record now, with its reply comments, after all other interested parties have commented. Other parties will have no

opportunity to controvert or otherwise challenge that evidence, and BOCs filing future applications will be encouraged to game the system by withholding evidence until the reply round of comments, when they are immune from attack. The Commission should foreclose those possibilities now, by striking Ameritech's new evidence.

Movants do not advocate a blanket rule prohibiting any discussion of post-application matters. For one thing, if all post-application matters are excluded from consideration, then a BOC could file a purportedly complete application and then fail to implement its statutory obligations after filing. And, because the date upon which a BOC files a § 271 application is controlled by the BOC, commenters should be allowed to introduce evidence of post-application matters tending to prove that the BOC was not in compliance on the date it filed its application. Many commenters did just that. To be sure, Ameritech has a right in reply to respond to such claims made by interested parties in their comments, and some of this new material falls into this category. Movants do not contend that Ameritech should be barred from submitting such factual information with its reply. But its massive submission goes far beyond that. Movants have submitted a proposed order with this motion specifying those portions of Ameritech's reply and affidavits that should be stricken.

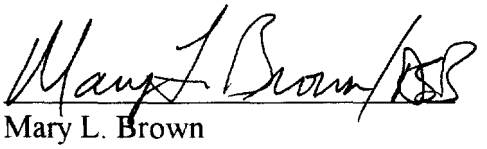
Ameritech was well aware of the Commission's rules and the law governing the proper contents of a reply submission, yet it chose to file this material anyway. The proper remedy is for the Commission either to strike the new material or to restart the ninety-day clock so as to afford interested parties a complete opportunity to comment on Ameritech's additional

evidence.

CONCLUSION

For the foregoing reasons, the Commission should strike from the record in this proceeding Ameritech's reply comments and supporting affidavits to the extent they raise legal and factual matters not previously discussed. The specific material that should be stricken is set forth in the proposed order submitted with this motion. Alternatively, the Commission should restart the 90-day statutory time period for action on Ameritech's application and allow interested parties a complete opportunity to comment.

Respectfully submitted,



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July 16, 1997

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Ameritech.

Lynn Shapiro Starr
Executive Director
Federal Relations

July 1, 1997

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JUL 1 1997
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, DC 20554

Re: Notice of Oral Ex Parte Presentation
CC Docket 97-137

Dear Mr. Caton:

In accordance with Section 1.206 of the Commission's rules, this letter serves to document an oral ex parte presentation made on June 30, 1997. The decision-making personnel of the Federal Communications Commission in attendance included Bill Kennard, General Counsel, Paula Silberthau, Richard Welch, Carol Mattey and Melissa Waksman. Representing Ameritech were John Lenahan, Gary Phillips, Lynn Starr and Toni Cook Bush of Skadden, Arps.

The purpose of the meeting was to discuss procedural issues relating to Ameritech's Reply comments. Specifically, agreement was reached that materials included in Ameritech's Reply Comments should be responsive to comments filed on the application.

Sincerely,

Lynn S. Starr

cc: B. Kennard
P. Silberthau
R. Welch
C. Mattey
M. Waksman

EXHIBIT 1

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Ameritech Michigan	)	CC Docket No. 97-137
Pursuant to Section 271 of the	)	
Telecommunications Act of 1996 to	)	
Provide In-Region, InterLATA	)	
Services in Michigan	)	

[PROPOSED] ORDER

BY THE COMMISSION:

Upon consideration of the Joint Motion of MCI, WorldCom and ALTS to Strike Ameritech's Reply to the Extent It Raises New Matters, or, in the Alternative, to Re-Start the Ninety-Day Review Process, the record in this proceeding, and good cause having been shown,

it is hereby ORDERED that the motion is GRANTED;

and it is hereby FURTHER ORDERED that the following portions of Ameritech's reply brief and supporting affidavits filed on July 7, 1997 shall be stricken from the record:

Reply Brief:

p. 5 n.9
p. 6 line 6 through p. 7 line 5
p. 8 n.11
pp. 8-9 carryover sentence and n.12
p. 9 paragraph headed "Order Processing Issues" and n.13
p. 10 first full sentence
p. 10 lines 12-15
p. 11 lines 3-5
pp. 11-12 paragraph headed "Regional vs. Michigan Data"
p. 12 paragraph headed "Improvement over Time"
p. 12 lines 19-20
p. 15 last sentence and n.21
pp. 19-20 paragraph beginning "Third . . ."

p. 22 lines 1-16 and n.28
p. 23 lines 1-8
p. 26 n.32
p. 31 lines 23-24

Affidavits:

Aron Reply Aff. ¶¶ 6, 23, 52-61, 63-69, 73, 74, 78-85, 98-105, Schedules 3 and 4;

Crandall/Waverman Joint Reply Affidavit ¶¶ 17, 19, 30-33, Table 3, and Appendix 2;

Edwards Reply Affidavit ¶¶ 7, 8, 20, 25, 30, 50-62, 80, 129, Attachments 6, 8, and 16 through 26;

Gates/Thomas Reply Affidavit in its entirety;

Gilbert/Panzar Joint Reply Affidavit ¶¶ 58, 62-64;

Harris/Teece Joint Reply Affidavit ¶¶ 3-5, 16, 18, 24-27, 30, 63, Tables II.1 through II.5, Figures 1 and 2;

Heltsley/Hollis/Larsen Joint Reply Affidavit ¶¶ 20, 23, 29-35, 65, 66, 68, Schedules 1-5, 7, 8, and 8.1;

Jenkins Reply Affidavit ¶¶ 16-72, 74, 75 n.8, 78, Schedules 3-5 and 8;

Kocher Reply Affidavit ¶¶ 4, 9, 58, 77-79, 85-114, Attachment 24, and Attachment 29;

MacAvoy Reply Affidavit ¶¶ 9, 10, 12, 13, 16, 35, 36, Tables 1-4, 6, and 7;

Mayer Reply Affidavit ¶¶ 8-10, 12, 13, 28;

Mayer/Mickens/Rogers Joint Reply Affidavit ¶¶ 8, 9 n.2, 10, 12, 16, 18, 20, 23, 28-30, 42, 49, 52, 61, 63, 64, 66, 68-73, 75, 76, 79, 81-83, 89, 91, 93, 94, 101, 103-106, 112, Schedules 3, 4, and 6;

Mickens Reply Affidavit ¶¶ 26-28, 32, 42, 43, 53, 54, 56, 58-61, 67, 68, 73, 75-77, 79-81, 84, 85, 94, 96, and all appended Schedules;

Quick Reply Affidavit ¶¶ 10-18;

Rogers Reply Affidavit ¶¶ 5, 6, 9, 12, 13, 15, 18, 21, 25, 28, 29, 34, 36, 39, 42, 58, 62, 67, 71, 72, 77-79, 81, 86, 88-90, 96, 98, and all appended Schedules;

Wilk/Fetter Joint Reply Affidavit ¶ 7;

Wynn Reply Affidavit ¶¶ 5-11 and Exhibit A.

IT IS SO ORDERED.

FEDERAL COMMUNICATIONS COMMISSION

CERTIFICATE OF SERVICE

I, D. Scott Barash, hereby certify that copies of the Joint Motion of MCI, WorldCom, and the Association for Local Telecommunications Services to Strike Ameritech's Reply to the Extent it Raises New Matters or, in the Alternative, to Re-Start the Ninety-Day Review Process and Proposed Order were served this 16th day of July, 1997, by hand (except where otherwise noted), upon each of the following persons:

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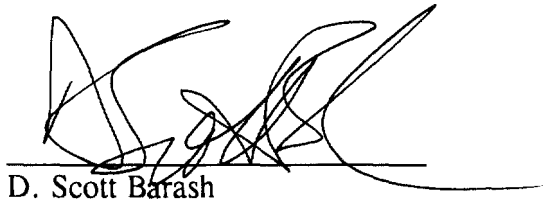

D. Scott Barash

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